Aw Eng Sun & Anor v Lau Kooi Cheun & Ors

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-478–04 OF 2012
PRASAD ABRAHAM J
7 FEBRUARY 2013

Companies and Corporations — Shares — Ownership of — Rectification of register of shares — Whether alternative remedy prescribed by law — Whether plaintiffs should have resorted to s11(8) and (9) of the Companies Act 1965 first — Counterclaim — Whether court was empowered to grant defendants' declaration — Companies Act 1965 ss 11(8), (9) & 162

Tort — Defamation — Libel — Whether proven — Defences — Whether available — Damages — Compensatory damages

The plaintiffs and defendants were shareholders in a private limited company, Rezatash Sdn Bhd ('the company'). In order to enhance the bumiputra participation in the company, the first plaintiff and the first and second defendants, who were also directors of the company, had decided to each transfer 10% of their respective shareholdings in the company to one Nik Mahmood bin Haji Nik Hassan ('Nik'). On 29 September 2010, the first and second defendants each transferred 150,000 of their respective shares in the company to Nik for the consideration sum of RM150,000 to each of them. The second plaintiff, the company secretary and director of the company, arranged for the transfer of these shares by filing the relevant Form 32A. However, on 8 February 2012 when the first and second defendants discovered that their shareholdings had been reduced, they vigorously denied that they had ever intended to transfer the relevant shares to Nik and disputed the validity of the Form 32A they had executed. The plaintiffs claimed that the transfer of shares from the first and second defendants' to Nik had been omitted in the filing of the Annual Return. Thus, on 10 February 2012, the plaintiffs rectified this omission by filing an amended Annual Return. Pursuant to the decision of the board of directors, the company secretary was instructed to issue a notice for an EGM to be held on 6 March 2012. However, the first and second defendants left the premises and did not participate in the EGM. As a quorum was present, the EGM proceeded and all three resolutions to remove the first plaintiff and Nik as directors of the company and to appoint the second defendant as director were defeated. An EGM was also held on 7 March 2012, where again the same three resolutions were defeated. Insofar as the company's records with the Companies Commission of Malaysia were concerned, the plaintiffs were the majority shareholders of the company. The

plaintiffs filed the present claim against the defendants. By way of this action the plaintiffs sought a rectification of the register of shares by praying inter alia for a declaration that the Annual Return (Form 49) filed and registered with the CCM was null and void. The defendants in their counterclaim attempted to seek a rectification of the share register to confirm their position as majority shareholders in the company. The plaintiffs had also in this suit maintained a claim of libel in respect of impugned statements published in *The Star* publication by the defendants.

Held, dismissing the plaintiffs' claims for declaratory relief and the defendants' counterclaim with no order as costs and allowing the plaintiffs' claim for defamation with costs of RM2,000:

(1) Whilst the court has a wide discretion to grant declarations, it would not do so if a particular statute provided a mechanism for a particular grievance to be addressed. In the present case, the Form 49 was being challenged and it is clear that in such cases the Registrar was duly empowered to deal with the same and was empowered to take remedial measures, if necessary. If the Registrar failed or refused to take action then the plaintiffs could lodge an appeal against that decision. As such, the plaintiffs should have resorted to s 11(8) and (9) of the Companies Act 1963 (the Act) first and they were precluded from bringing this action for the declarations that they sought. Further, save for ss 162 and 181 of the Act, the court had no power to order the amendment of records in the CCM (see paras 19 & 21–22).

(2) Even if, the declaration sought by the plaintiffs was granted it would be rendered nugatory as this court did not have the power under the Act to expunge Form 49. As documents such as the Form 49 were public documents, the Registrar had to ensure that that these documents were accurate by speedily disposing of complaints under s 11(8) and (9) of the Act for otherwise the public would be misled and irreparable damage would be caused. It was not sufficient to seek a declaration of rights but what was more important was the expunging of the offending Form 49 in the CCM Register, which only the Registrar was empowered in law to do. Thus, the prayers sought by the plaintiffs should be dismissed on this ground alone (see paras 23, 25 & 27).

(3) In an action where a rectification of the register of shares was sought, the proper party should be the company. However, the company had not been cited as a party either by the plaintiffs in their claim nor by the defendants in their counterclaim. In this case, both the plaintiffs and the defendants could have relied on specific provisions of the Act to redress their grievances rather than resorting to declaratory relief. They were thus refused declaratory relief (see para 28).

(4) The court was not empowered to grant the defendants' declaration that

the shareholding position was as stated by them, as there was no specific application under s 162 of the Act. Thus the relief sought by the defendants was dismissed in limine (see paras 34 & 42).

(5) As there was no element of maliciousness in respect of the impugned article in *The Star*, the said article was not defamatory. However, two other publications referred to in para (3) and (4) of the statement of claim were defamatory. The impugned statement in para (3) imputed misconduct on the part of a substantial shareholder, without even inserting the word 'alleged' before the word 'misconduct'. The other impugned statement referred to in para (4), a letter addressed to the plaintiffs by the defendants was also clearly defamatory. Both articles tended to lower the plaintiffs in the estimation of right thinking men in general and would expose the plaintiffs to ridicule. The defences of justification and qualified privilege were not available to the defendants in the instant case. Thus the plaintiffs had made out a case for defamation on the impugned articles in para 3 and 4 of the statement of claim. Compensatory damages in the sum of RM15,000 was duly awarded to the plaintiffs in respect of both impugned statements (see paras 36–37 & 41–42).

[Bahasa Malaysia summary

Plaintif-plaintif dan defendan-defendan merupakan pemegang-pemegang syer dalam sebuah syarikat persendirian berhad, Rezatash Sdn Bhd ('syarikat tersebut'). Untuk meningkatkan penyertaan Bumiputra dalam syarikat tersebut, plaintif pertama dan defendan pertama dan kedua, yang merupakan pengarah-pengarah syarikat, telah memutuskan untuk memindahkan 10% daripada pemegangan syer masing-masing dalam syarikat tersebut kepada seorang yang bernama Nik Mahmood bin Haji Nik Hassan ('Nik'). Pada 29 September 2010, defendan pertama dan kedua masing-masing memindahkan 150,000 syer-syer mereka dalam syarikat kepada Nik bagi jumlah balasan sebanyak RM150,000 kepada mereka. Plaintif kedua, setiausaha syarikat dan pengarah syarikat, mengatur bagi perpindahan syer-syer dengan memfailkan Borang 32A yang relevan. Walau bagaimanapun, pada 8 Februari 2012 apabila defendan pertama dan kedua mendapati bahawa pemegangan syer mereka telah dikurangkan, mereka tegas menafikan bahawa mereka berniat untuk memindahkan syer-syer yang relevan kepada Nik dan mempertikaikan kesahan Borang 32A yang telah mereka meterai. Plaintif-plaintif mendakwa bahawa pindahan syer daripada defendan pertama dan kedua kepada Nik telah ditinggalkan dalam pemfailan pulangan tahunan. Berikutan keputusan lembaga pengarah, setiausaha syarikat diarahkan untuk mengeluarkan notis untuk mengadakan EGM pada 6 Mac 2012. Walau bagaimanapun, defendan pertama dan kedua meninggalkan premis dan tidak menyertai EGM tersebut. Memandangkan korum hadir, EGM diteruskan dan ketiga-tiga resolusi untuk melucutkan plaintif pertama dan Nik sebagai

pengarah-pengarah syarikat tersebut dan untuk melantik defendan kedua sebagai pengarah telah dikalahkan. Suatu EGM juga diadakan pada 7 Mac 2012, di mana, sekali lagi, tiga resolusi yang sama dikalahkan. Setakat rekod-rekod syarikat dengan Suruhanjaya Syarikat Malaysia ('SSM') yang terlibat, plaintif-plaintif merupakan pemegang-pemegang majoriti syer syarikat. Plaintif-plaintif memfailkan tuntutan ini terhadap defendan-defendan. Melalui tindakan ini, plaintif-plaintif memohon pembetulan bagi pendaftaran syer-syer dengan memohon, antara lain, bagi deklarasi bahawa pulangan tahunan ('Borang 49') yang difailkan dan didaftarkan dengan SSM adalah batal dan tidak sah. Defendan-defendan dalam tuntutan balas mereka cuba memohon pembetulan dalam pendaftaran syer untuk mengesahkan kedudukan mereka sebagai pemegang-pemegang majoriti syer dalam syarikat tersebut. Plaintif-plaintif juga, dalam tindakan ini, membuat tuntutan fitnah bertulis bagi kenyataan-kenyataan yang dipertikaikan yang mana diterbitkan dalam penerbitan *Star* oleh defendan-defendan.

Diputuskan, menolak tuntutan-tuntutan plaintif-plaintif bagi relief pengisytiharan dan tuntutan balas defendan-defendan tanpa perintah terhadap kos dan membenarkan tuntutan-tuntutan plaintif-plaintif bagi fitnah dengan kos sebanyak RM2,000:

(1) Walaupun mahkamah mempunyai kuasa budi bicara yang luas untuk membenarkan deklarasi, ia tidak akan berbuat sedemikian jika statut yang khusus memperuntukkan mekanisme untuk menangani satu-satu kilanan. Dalam kes ini, Borang 49 dicabar dan adalah jelas bahawa dalam kes-kes sedemikian, pendaftar diberikan kuasa untuk menanganinya dan diberikan kuasa untuk mengambil langkah-langkah pembaikan, jika perlu. Jika pendaftar gagal atau enggan mengambil tindakan, plaintif-plaintif boleh membuat rayuan terhadap keputusan tersebut. Dengan itu, plaintif-plaintif sepatutnya merujuk kepada s 11(8) dan (9) Akta Syarikat 1963 ('Akta') dahulu dan dihalang daripada membawa tindakan ini bagi deklarasi-deklarasi yang dipohon. Selanjutnya, kecuali ss 162 dan 181 Akta, mahkamah tidak mempunyai kuasa untuk memerintahkan pindaan kepada rekod-rekod dalam SSM (lihat perenggan 19 & 21–22).

(2) Jika pun deklarasi yang dipohon oleh plaintif-plaintif dibenarkan, ia akan menjadi sia-sia kerana mahkamah ini tidak mempunyai kuasa di bawah Akta untuk melupuskan Borang 49. Oleh kerana dokumen seperti Borang 49 adalah dokumen awam, pendaftar perlu memastikan bahawa dokumen-dokumen ini adalah tepat dengan melupuskan aduan-aduan di bawah s 11(8) dan (9) Akta dengan cepat kerana jika tidak, orang awam akan terperdaya dan mudarat yang tidak boleh ditebus akan berlaku. Adalah tidak mencukupi untuk memohon deklarasi hak tetapi apa yang lebih penting adalah melupuskan Borang

49 yang salah dalam daftar SSM, yang mana hanya pendaftar sahaja yang berkuasa di bawah undang-undang untuk berbuat demikian. Oleh itu, permohonan yang dipohon oleh plaintif-plaintif mestilah ditolak atas alasan ini sahaja (lihat perenggan 23, 25 & 27).

(3) Dalam tindakan di mana pembetulan bagi daftar syer-syer dipohon, pihak yang sebetulnya adalah syarikat. Walau bagaimanapun, syarikat tidak dinamakan sebagai pihak oleh sama ada plaintif dalam tuntutan mereka mahu pun defendan-defendan dalam tuntutan balas mereka. Dalam kes ini, kedua-dua plaintif-plaintif dan defendan-defendan sepatutnya merujuk kepada peruntukan spesifik Akta untuk membetulkan kilanan mereka daripada merujuk kepada relif pengisytiharan (lihat perenggan 28).

(4) Mahkamah mempunyai kuasa untuk membenarkan deklarasi defendan-defendan bahawa kedudukan pemegangan syer adalah seperti yang mereka nyatakan, kerana tiada pemakaian spesifik di bawah s 162 Akta. Oleh itu, relief yang dipohon oleh defendan-defendan ditolak pada peringkat awal (lihat perenggan 34 & 42).

(5) Oleh kerana tiada elemen niat jahat dalam artikel yang dipertikaikan dalam *Star*, artikel tersebut tidaklah bersifat memfitnah. Walau bagaimanapun, dua lagi penerbitan yang dirujuk dalam perenggan (3) dan (4) penyata tuntutan adalah fitnah. Kenyataan yang dipertikaikan dalam perenggan (3) mengaitkan salah laku oleh pemegang syer substantial, walaupun tanpa memasukkan perkataan 'alleged' sebelum perkataan 'misconduct'. Kenyataan lain yang dipertikaikan merujuk perenggan (4), iaitu sepucuk surat yang dialamatkan kepada plaintif-plaintif oleh defendan-defendan adalah jelas memfitnah. Kedua-dua artikel seolah-olah merendahkan plaintif-plaintif dalam pandangan seorang lelaki yang waras dan akan mendedahkan plaintif-plaintif kepada cemuhan. Pembelaan justifikasi dan kepentingan bersyarat tidak wujud bagi defendan-defendan dalam kes ini. Oleh itu, plaintif-plaintif berjaya membuktikan kes fitnah bagi artikel-artikel yang dipertikaikan dalam perenggan 3 dan 4 penyata tuntutan. Ganti rugi pampasan berjumlah RM15,000 wajar diawardkan kepada plaintif-plaintif bagi kedua-dua kenyataan yang dipertikaikan (lihat perenggan 36–37 & 41–42).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.
For cases on ownership of shares, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1023–1032.

Cases referred to

Central Securities (Holding) Bhd v Haron bin Mohamed Zlaid [1979] 2 MLJ 244, FC (refd)

Fraser & Neave Ltd & Ors v Aberdeen Asset Management Asia Ltd & Anor [2002] 4 SLR 473, HC (refd)
KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd [1994] 2 MLJ 201, SC (refd)
Lim Cheong Kern v Vacpak Realty Sdn Bhd & Anor [1999] 5 MLJ 296 (refd)
Metal Industry Employees Union v Registrar of Trade Unions & Ors [1976] 1 MLJ 80 (refd)
Norakhmar bt Baharom and Anor v Lee Ming Leong & Ors [2007] 8 MLJ 50, HC (refd)
Perbadanan Perwira Harta Malaysia v Mohd Baharin bin Hj Abu [2010] 5 MLJ 295, CA (refd)
Suparmi bte Hj Sutrisnah v Salmah bte Abdullah File No K23-1 of 2007–1), HC (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)

Legislation referred to

Companies Act 1965 ss 11(8), (9), (10), 162, 162(1), 1(a), (b), 181 Form 32A, Form 49
Trade Unions Ordinance 1959 s 17

Majid (Mohd Adnan Majid with him) (Majid & Chen) for the plaintiffs.
Foo Lei Mei (William Foo with her) (Foo Li Mei & Siong) for the defendants.

Prasad Abraham J:

[1] This is a case involving a dispute between two groups of shareholders in a private limited company and the pivotal issue in this case is and was the actual shareholding position of each of these groups of shareholders, in the company.

MATERIAL FACTS

[2] Rezatash Sdn Bhd (Company No 30078-P) ('the said company') was incorporated on 9 November 1976 (pp 3–8 of bundle B). In 1985, the first plaintiff ('Aw'), the director of the said company bought the said company and invested RM650,000 in the said company in order to raise up the paid up capital of the said company. The first plaintiff entered into discussions with the first defendant, a director of the said company to use the said company as a vehicle for a network marketing business sometime in 2009. As a consequence of that, the first and second defendants, directors of the said company were given RM543,750 and RM300,000 shares respectively. One Nik Mahmood bin Hj Nik Hassan ('Nik') a close associate of the first plaintiff was originally allotted 37,500 shares. However it was felt that between first plaintiff and the

first and second defendant to enhance the *bumiputra* participation in the said company, they would each transfer 10% of their respective shareholdings to the said 'Nik'.

[3] The second plaintiff ('Foo'), the company secretary and a director of the said company, was requested to arrange for the transfer of the shares. On 29 September 2010, the first defendant ('Lau') transferred 150,000 of his shares in the company to Nik for the consideration sum of RM150,000. On 29 September 2010, the second defendant ('Goh') also transferred RM150,000 of his shares in the said company to Nik for the consideration of RM150,000 ('collectively the said Form 32A') (see pp 137–139 of bundle B).

[4] On 30 January 2012, FKO Corporate Services Sdn Bhd received a requisition letter from first and second defendants addressed to the board of directors of the said company requesting for a requisition for an extraordinary general meeting ('EGM') of the said company (see p 53 of *ikatan dokumen tambahan bersama*).

[5] Upon receipt of the said letter dated 30 January 2012, FKO Corporate Services Sdn Bhd also replied to Lau and Goh by their letter dated 8 February 2012 informing them that their shareholdings had been incorrectly stated as per the register of members of the said company, the shareholdings of Lau and Goh as at 30 January 2012 were as follows:

Name of Shareholder	No of Shares Held	Percentage of Shareholding
Lau Kooi Cheun	393,750	26.25%
Goh Hock Hwa	150,000	10.00%

(See p 92 of bundle B).

[6] Upon receipt of the letter from FKO Corporate Services Sdn Bhd dated 8 February 2012, Lau and Goh conducted a search with the CCM on 6 March 2012. The results of the search was that their shareholdings had been reduced.

[7] The plaintiffs have given evidence that inadvertently the transfers of shares from Lau and Goh to Nik had been omitted in the filing of the annual return of the company. This omission was subsequently rectified by filing an amended form of annual return of 10 February 2012 (see p 94 of bundle B).

[8] Armed with these facts, Lau and Goh immediately wrote to Foo on 14 February 2012, to inform them that they had no knowledge of and had never executed a Form 32A after 30 June 2011. This incidentally happened to be the date of the original annual return of the company that was filed (see p 112 *ikatan dokumen bersama*).

[9] A series of interactions occurred between the company secretary's office and Lau and Goh which culminated in visits to the stamping office and police station. Needless to say, Lau and Goh vigorously denied that they had ever intended to transfer the relevant shares to Nik and in any event disputed the validity of the Form 32A they had executed (See letter to Lau and Goh from stamping office dated 16 February 2012 at pp 160–161 of bundle B and see also a police report made by Lau and Goh dated 16 February 2012 at p 162–164 of bundle B).

[10] Subsequently Lau and Goh vide their letter dated 21 February 2012, wrote to the company secretaries of the company requisitioning for an EGM on 7 March 2012.

[11] The company secretary had earlier on 8 February 2012 given notice of a board of directors' meeting to consider the notice of requisition sent by Lau and Goh on 20 January 2012. The board of directors meeting was set down for 16 February 2012 at 11am.

[12] Pursuant to the decision of the board of directors' at a meeting held on 16 February 2012, the company secretary was instructed to issue notice for an EGM to be held on 6 March 2012.

[13] At the EGM fixed on 6 March 2012, Lau and Goh were at the office of the company secretary. However, instead of participating in the EGM, Lau handed to Foo's employee some documents and left the premises.

[14] At the EGM fixed on 6 March 2012, as a quorum was present, the EGM proceeded and all three resolutions to remove Aw and Nik as directors of the company and to appoint Goh as director of the company were defeated.

[15] An EGM was also held on 7 March 2012 at the office premises of the company, this was because Lau and Goh took exception to the notice of EGM dated 20 February 2012 and informed the company secretary of their intention to hold an EGM on 7 March 2012. When the parties arrived at the office premises of the company in Bukit Jalil, they were allegedly denied access into the premises by Lau and Goh's solicitor, Mr William Foo as Lau and Goh had allegedly seized the office premises on 6 March 2012. The shareholders present eventually agreed that the meeting would be held outside the office premises. The EGM on 7 March 2012 commenced at 9.30am and ended at 10am where again all the three resolutions proposed to remove Aw and Nik as directors and to appoint Goh as director were defeated. Lau and Goh was seen around the vicinity of the office premises up until around 11am.

[16] The situation as far as the company's records with CCM is concerned is that the plaintiff's are the majority shareholders of the company.

[17] Some aspects of the affairs of the said company are being investigated by CCM and as at the conclusion of this trial, no action thus far has been taken by CCM to correct the anomalies.

[18] The first issue as the court perceives it from the plaintiff is found in prayer (e) of its prayers in the statement of claim ie the Form 49 filed by the said company dated 7 March 2012 and registered on 29 March 2012 with the Companies Commission of Malaysia ('CCM') is null and void. The rest of the prayers sought for in (a)–(i) of the statement of claim are in my view consequential to this declaration sought (see pp 154–155 of bundle B).

[19] It is my judgment without going into the unravelling of the Gordian's knot of facts, the plaintiff is moving this court to declare the Form 49 filed and registered in the CCM as null and void. Whilst the court has a wide discretion to grant declarations, but it would not do so if a particular statute provides a mechanism for a particular grievance to be addressed. I refer to the decision of the Federal Court in *Metal Industry Employees Union v Registrar of Trade Unions & Ors* reported in [1976] 1 MLJ 80 where it was held:

> The court should not be invited to make the declaration sought since an alternative remedy was clearly prescribed by the law by way of appeal to the Minister under s 17 of the Trade Unions Ordinance 1959.

[20] I make reference to s 11(8) and 11(9) of the Companies Act 1965 (Act 125) Revised 1973 ('the said Act') which I now set out:

> (8) If the Registrar is of the opinion that a document lodged or registered with him
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> (a) contains matters contrary to law;
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> (b) contains matter that, in a material particular, is false or misleading in the form or context in which it is included;
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> (c) by reason of an omission or misdescription has not been duly completed;
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> (d) does not comply with the requirements of this Act; or
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> (e) contains an error, alteration or erasure,
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> the Registrar may request
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> (f) that the document be appropriately amended or completed and resubmitted;
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> (g) that a fresh document be submitted in its place; or
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> (h) where the document has not been duly completed, that a supplementary document in the prescribed form be lodged.

(9) The Registrar may require a person who submits a document for lodgment with the Registrar to produce to the Registrar such other document, or to furnish to the Registrar such information, as the Registrar thinks necessary in order to form an opinion whether he may refuse to receive or register the document.

[21] It is clear where the Form 49 is being challenged, then the registrar is duly empowered to deal with the same and is empowered to take remedial measures, if necessary. In the event the registrar fails and or refuses to do so, or if the plaintiff felt aggrieved with his decision, then the plaintiff could lodge an appeal against that decision by invoking s 11(10) of the said Act, or by an action being filed to rectify of the register pursuant to s 162 of the said Act, or other relevant provisions of the said Act. The court has been told that CCM is investigating the complaint. I therefore find the plaintiffs should have resorted to s 11(8)– (9) of the said Act first and therefore are precluded from bringing this action for the declarations that they seek and the plaintiff would have to exhaust the provisions of s 11(8)– (9) of the said Act first. I make reference to the oral judgment (extempore) of His Lordship Kang Hwee Gee J in the case of *Norakhmar bt Baharom and Anor v Lee Ming Leong & Ors* reported in [2007] 8 MLJ 50 where His Lordship held and I quote:

(1) There is no provision under the law for expunging documents filed at the CCM. The CCM, apart from its many other functions, is a depository of company documents which members of the public may have access to. Any documents filed with the CCM must remain with the CCM save that under s 11(10) of the Act, any person aggrieved by the decision of the registrar of companies to accept or reject documents filed with the registry may within 30 days of the decision of the registrar apply to the court to challenge the decision of the registrar. Where no court application has been initiated under this provision, the documents will have to remain as a permanent record at the CCM (see para 10).

(2) It follows, therefore, that the plaintiffs' application to expunge those documents already filed by the company during the directorship of the fourth defendant is misconceived (see para 11).

[22] I would go further to say the registrar when exercising his powers under s 11(8)– (9) of the said Act, acts in a quasi judicial capacity and has a bearing on the rights of parties in the said company for information in the register of the said company is notice to the public at large and is prima facie the position of the said company. So resort must be had to these provisions first and if the registrar refuse and or declines to act then s 11(10) of the said Act could be resorted to. Save for ss 162 and 181 of the said Act, the court has no power to order the amendment of records in the CCM.

[23] Even if, I were to grant the declaration sought, it still would be rendered nugatory as this court does not have the power under the said Act to expunge

Form 49, and the position in Form 49 filed would remain notice to the world of the information stated therein. It is therefore my view that the scheme of the said Act particularly s 11(8)–(9) has provided an avenue for disputes regarding forms filed at the CCM to be dealt with by the registrar.

[24] The registrar, pursuant to s 11(8)– (9) of the said Act, is empowered with the task of investigating, and is also empowered to take remedial action as provided for under these sections. CCM cannot in my view take the position that the CCM is purely a depository and affirmative action must be taken by way of obtaining a court order for instance. The scheme of the said Act under these sections provide for the registrar to act so as to ensure the records maintained at the registry of CCM are genuine, accurate and do not infringe the law. As documents of this nature attract public notice of its contents, the registrar on his own must act under the said sections to rectify or remedy the situation to ensure the authencity and accuracy of documents filed in the CCM. The Nation's Commercial activities demands searches at the registry of CCM being accurate and if they are not, the registrar must act expeditiously to correct the same as the fate of so many commercial transactions depends on the particulars of these searches and the information maintained therein which are deemed public documents.

[25] Bearing in mind it is a public documents the registrar must ensure that these documents are accurate and must speedily dispose of complaints under s 11(8)–(9), otherwise the public would be misled and irreparable damage may be caused. It is not sufficient to seek a declaration of rights but what is more important is the expunging of the offending form in the CCM Registrar, which only the registrar is empowered in law to do subject to an appeal to this court under s 11(10) of the said Act.

[26] I refer to the decision of the Supreme Court in *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* reported in [1994] 2 MLJ 201 and to the judgment of Mohamed Dzaiddin SCJ (as he then was) and I quote:

> The conclusion that follows from the above opinion, with which we respectfully agree, is that the common law doctrine of constructive notice should apply to Form 49. To reiterate, Form 49 is a public document which contains particulars of directors who are the mind and will of a company, as well as managers and secretaries who are responsible for the day-to-day running of the company. It is a document which affects the powers of the company and its agents. Certainly, its purpose must be more than just to provide information about the company's directors, managers and secretaries. Therefore, persons dealing with the company should check with the registrar of companies who its directors, managers and secretaries are at any given time.

[27] I would therefore dismiss paras (a)–(i) of the prayers sought of the plaintiff's claim on that ground alone.

[28] The real dispute between the parties is the actual shareholding of the said company. Both the first and second plaintiffs and the first and second defendants maintain that they are in majority. The simplest way of determining this was to resort to s 162 of the said Act, which provides a summary action for the rectification of the share register of the said company. However, where there are serious disputes the allegation of fraud and a need for further evaluation of the facts, then the proper action would be to bring a civil suit. In an action where a rectification of the register of shares is sought, the proper party must be the said company. In this case, the said company has not been cited as a party either by the plaintiff in its claim nor the defendants in their counterclaim. By the prayers sought from by the defendants in their counterclaim ie the actual nature of the relief sought though not specifically mentioned, is the determination of the actual shareholding of the said company and the affirmative declarations sought are in effect a rectification of the share register.

[29] I refer to the decision of the Court of Appeal in *Perbadanan Perwira Harta Malaysia v Mohd Baharin bin Hj Abu* reported in [2010] 5 MLJ 295 where it was held:

> (2) Although the word 'reinstatement' did not appear anywhere in the respondent's pleading, what in effect was sought by the respondent was reinstatement. The declaration sought by him would therefore inevitably amount to or involve specific performance of his contract of service. He was not entitled to it (see para 14).
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> (3) The learned judge erred when he allowed the respondent's claim. The respondent could have claimed for wrongful dismissal. But he did not do so. In his statement of claim he pleaded that the termination of his service was null and void and of no consequence and that he was still an employee of the first respondent. His pleaded case was clearly for a declaration that his termination was null and void and that he was praying for reinstatement, not wrongful dismissal pursuant to a breach in his contract of service. For such a pleaded case, he was not without any remedy. He could have filed his case in the Industrial Court pursuant to the Industrial Relations Act 1967. He did not do so (see para 22).

[30] Here both the plaintiffs and the defendants could have relied on specific provisions of the said Act to redress their grievances rather than resorting to declaratory relief and it is for those reasons. I refused declaratory relief to the plaintiff and the defendants.

[31] I refer to the decision of *Central Securities (Holding) Bhd v Haron bin Mohamed laid* reported in [1979] 2 MLJ 244 at p 250 where it was held:

> Be that as it may, it seems to us to be somewhat futile exercise to deal with this point because the real issue here is not whether s 162 of the Companies Act is or is not relevant, but whether rectification under the section is an appropriate remedy, or whether the remedy should be by way of a suit. We take the view that an application for rectification cannot be granted where there are serious disputes regarding title and the issues cannot be properly decided in the summary proceedings under the section. Delay is a material consideration. In the present case, the delay is almost two years.

And to the judgment of His Lordship Suriyadi J (as he then was) in *Lim Cheong Kern v Vacpak Realty Sdn Bhd & Anor* reported in [1999] 5 MLJ 296 at p 304 and I quote:

> From the facts so far already adduced, it would be improbable that this application could be approved by reason of the complex facts, and the prevalence of a substantial number of intricate legal points yet to be resolved. It is quite trite that where courts are faced with serious disputes of title, allegations of fraud or some further investigation pertaining the facts may be required, the proper course will be to commence a suit against the company.

[32] I also refer to *Malaysian Company Law, Principles & Practice* at p 428:

> *11.049. In Morgan v Morgan Insurance Brokers Ltd* it was held that under the English Rules of the Supreme Court, Order 102, rule 3, the proper respondents to an application to rectify the register were the company and the registered holder or holders of the shares whose registration was in question if not the applicant. It is proper to join the company as the respondent in order that it can be bound by the decision of the Court. It is not necessary to join the directors of the company in the application unless an order for costs is to be sought against them. Directors who are not themselves members of a company are incompetent to challenge the validity of a transfer of shares.

[33] The defendants in their counterclaim attempt to seek a rectification of the share register to confirm their position as majority shareholders in the said company ie bundle A, ie paras (79.11) for the aforesaid reasons I would dismiss prayer and the declarations sought in paras (79.10) and (79.12) for the aforestated reasons.

[34] The defendants in paras (79.11) of their counterclaim seek a declaration that the shareholding position is as stated by the defendants. Section 162(1) only empowers the court to act in the context of s 162(1), (a)–(b) only. The defendants do not fall within that category as the position of the shareholding is as set out in the CCM records as at 6 March 2012 (see p 6 of bundle B). The court is not empowered to grant a declaration sought, as it is only empowered to rectify under the said Act and there is no specific application under s 162 of

the said Act. I would therefore dismiss prayer (79.11). For the aforesaid reasons I dismiss also paras (79.9) and (79.10).

[35] The plaintiffs have also in this suit maintained a claim of libel in respect of impugned statements set out in para 8 of the statement of claim and published in the STAR Publication appearing in *The Star* classified on the 9 April 2012. The court is of the view the impugned statement appearing in law does not constitute a defamatory statement. I am in agreement with the views of Justice David Wong Dak Wah (as he then was) in *Suparmi bte Hj Sutrisnah v Salmah bte Abdullah,* (In the High Court in Sabah & Sarawak, File No K23–1 of 2007–1) — authority No 66 in the defendant bundle of authorities and I quote:

> In general, an action lies formalicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned

[36] The defendants are under a duty to inform the public of the position of the plaintiffs, as they perceive the same so as not to be accused of holding the plaintiffs out as directors where they take the position they are not. I do not think there is any element of maliciousness in the impugned article and I would therefore hold that this impugned article in *The Star* is not defamatory. There are two other publications referred to in paras (3)–(4) of the statement of claim. I set out the first statement in its entirety:

> 3. All employees shall not take any instruction from Mr Aw Eng Sun and Mr Foo Kean Oo as both of them has been suspended due to pending investigation of their misconducts.

[37] I find the language used in this letter is certainly defamatory because it imputes misconduct on the part of a substantial shareholder of the said company and published to its employees. The defendant appear to have condemned them without even inserting the words alleged before the word misconduct. The second impugned statement is referred to in para 4 of the statement of claim and I now set it out:

> The management of Rezatash Sdn Bhd acknowledged the ill conducts done by your good self for which seriously affecting the integrity and goodwill of the company. You may please to note that such misconducts are contradicting the honest practice of this organization.

[38] The approach of looking at the letters in detail was adopted by the Singapore High Court reported in the judgment of *Fraser & Neave Ltd & Ors*

v Aberdeen Asset Management Asia Ltd & Anor reported in [2002] 4 SLR 473 and the judgment of Tan Lee Meng J and I quote:

> Principles for construing allegedly defamatory words
>
> 10 What is meant by the term 'natural and ordinary meaning of words' was explained by Lord Reid in *Rubber Improvement v Daily Telegraph* [1964] AC 234 at 258, in the following succinct terms:
>
> > What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning.
>
> 11 The above passage was endorsed by the Court of Appeal in *Microsoft Corp v SM Summit Holdings* (supra at p 556).
>
> 12 The principles for determining the natural and ordinary meaning of words are well known. In *Microsoft Corp v SM Summit Holdings,* LP Thean JA summed up the position at p 53 as follows:
>
> > The court decides what meaning the words would have conveyed to an ordinary, reasonable person using his general knowledge and common sense: *Jeyaretnam Joshua Benjamin v Goh Chok Tong* [1985] 1 MLJ 334; [1984–1985] SLR 516 … The test is an objective one: it is the natural and ordinary meaning as understood by an ordinary, reasonable person, not unduly suspicious or avid for scandal. The meaning intended by the maker of the defamatory statement is irrelevant. Similarly, the sense in which the words were actually understood by the party alleged to have been defamed is also irrelevant. Nor is extrinsic evidence admissible in construing the words. The meaning must be gathered from the words themselves and in the context of the entire passage in which they are set out. The court is not confined to the literal or strict meaning of the words, but takes into account what the ordinary, reasonable person may reasonably infer from the words. The ordinary, reasonable person reads between the lines.

[39] This is a letter that was addressed to the first and second plaintiff but the defendants contends that since it was addressed to the plaintiffs personally there was no publication. The impugned statement is clearly defamatory as both articles tend to lower the plaintiffs in the estimation of right thinking men in general and would expose the plaintiff to ridicule. See the case *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58 and I quote:

> *Gatley on Libel and Slander*, (6th Ed), at p 4, para 4 says:

> There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend 'to lower the plaintiff in the estimation of right-thinking members of society generally, 'to cut him off from society,' or 'to expose him to hatred, contempt or ridicule,' is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published.

Further, at p 14, para 31, Gatley says:

> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency.

Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[40] I do not think the defence of justification and qualified privileges applies while the investigation of the registrar is pending as to various allegations in this case or the outcome of this matter. Qualified privileged to my mind, as a defence is also not sustainable as no legal, moral or social duty could justify the malicious language used in both the letters. I therefore find the plaintiff has made out a case for defamation on the two impugned articles in paras 3–4 of the statement of claim.

[41] As to damages, I will award compensatory damages and the principles are set out in *Evans on Defamation in Singapore and Malaysia* (3rd Ed), pp 187–188 and I quote:

> Compensatory Damages
>
> Where libel is concerned, the Plaintiff need not prove actual damage in order to succeed. The law presumes some damage will result in the ordinary course when a Defendant invades another's absolute right to reputation. The same is of course true of slander actions which fall within the four exceptions canvassed in Chapter 5.
>
> In determining an award of damages, the general rule is, in all such cases, that the law assesses damage on a compensatory basis. This will include any actual and anticipated pecuniary loss, any resultant social disadvantage, and compensation for the natural grief and distress which the Plaintiff might feel as a result of the statement having been published. If actual pecuniary loss (special damages) is claimed, the Plaintiff must prove that loss and the causal connection between the defamatory remarks and the loss.

Compensatory damages are awarded to compensate, not to punish. The level of award of compensatory damages should address the three purposes for such damages, namely consolation for the personal distress and hurt caused by the publication (ie solatium); compensation to repair the harm done to the Plaintiff's personal and business reputation (if relevant); and vindication of the Plaintiff's reputation. If the element of consolation is insufficient to vindicate the Plaintiff, the damages ought to be increased. It is important to note that the vindication aspect is not just directed to the past, but must also be sufficient to allow the Plaintiff to vindicate his reputation in future should the earlier allegation resurface at a later date.

A compensatory damage figure cannot be arrived at by a purely objective computation. In assessing damages, the Court will not have regard to the scale of values applied when equating money with physical injuries in the field of personal injury claims. The reason for refusing to make such comparison seems to be that, in a defamation action, the award should be sufficient not only to compensate the Plaintiff for the losses sustained, but to allow him, in case the charges later resurface, to point to the sum awarded so as to convince a bystander that the charges are without foundation. The damages awarded operate both as a vindication of the Plaintiff to the public and as a consolation to him for the wrong done.

[42] Taking into account all these factors I would award compensatory damages in the sum of RM15,000 in respect of both impugned statements. As to the defendant's counterclaim, I have already dealt with the prayers sought by the defendant in respect of the shareholding. The prayers sought by the defendant in paras 79.1–79.8 are in respect of causes of action vested in the said company not individual shareholders. The said company is not a party to this suit and had this been an action brought under s 181 of the said Act, then the court would have been empowered once a finding of oppression of a petitioning shareholder, was found, and the court would be in a position to grant a wide range of reliefs to address the oppression. As it stands, it is my judgment, only the said company could seek, the reliefs sought and the defendants relief sought in these paragraphs is dismissed in liminie.

[43] In the light of the aforesaid the court orders:

(a) paras (a)–(i) and (p) of the statement of claim is dismissed with no order as to costs;

(b) in respect of the two letters published on 6 March 2012, only, compensatory damages in the sum of RM15,000 only;

(c) in respect of prayer (k) of the statement of claim, order in terms in respect of the two letters published on 6 March 2012;

(d) the counterclaim of the defendant is dismissed with no order as to costs;

(e) parties be at liberty to apply; and

(f) with regards to costs on the finding of defamation in favour of the plaintiff, the court awarded a sum of RM2,000. Costs to be paid by the defendant to the plaintiff forthwith.

Plaintiffs' claims for declaratory relief and defendants' counterclaim dismissed with no order as to costs but plaintiffs' claim for defamation allowed with costs of RM2,000.

Reported by Kohila Nesan